

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**BRETT L. JOHNSON**

**APPELLANT,**

**v.**

**STATE OF MISSOURI**

**RESPONDENT.**

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DOCKET NUMBER WD71057  
**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

DATE: December 7, 2010

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Appeal From:

Clay County Circuit Court  
The Honorable Anthony Rex Gabbert, Judge

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Appellate Judges:

Division One: James M. Smart, Jr., P.J., Mark Pfeiffer, and Cynthia L. Martin, JJ.

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Attorneys:

Susan L. Hogan, Kansas City, MO, for **appellant**.

Shaun J. Mackelprang and Karen L. Kramer, Jefferson City, MO, for **respondent**.

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**MISSOURI APPELLATE COURT OPINION SUMMARY**

**MISSOURI COURT OF APPEALS  
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**STATE OF MISSOURI,**

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No. WD71057

Clay County

Before Division One Judges: James M. Smart, Jr., P.J., Mark Pfeiffer, and Cynthia L. Martin, JJ.

Brett Johnson was tried for first-degree murder and armed criminal action. The evidence at trial showed that Johnson and another man devised and carried out a plan to murder Jimmy Weber. That plan involved enlisting the help of two other friends, both of whom testified against Johnson at trial. The parties agreed to permit two videotaped statements that one of those friends, Lindsay Harper, made to the police to be played at trial and to provide transcripts to the jury. At trial, the State introduced evidence, without objection, about violently themed books that belonged to Johnson's co-conspirator and questioned Johnson, without objection, about whether he had read those books. On rebuttal, the State called a witness to testify about incriminating statements Johnson had made to him about the murder while the two were in jail together. The State failed to notify defense counsel prior to trial about those statements, in violation of its discovery duty under Rule 25.03. Johnson was convicted on both counts. This court affirmed on direct appeal.

Johnson filed a Rule 29.15 motion, claiming that trial counsel was ineffective in his handling of the evidence of the violently themed books and for agreeing to submit the videotapes and transcripts of Harper's police statements. He claimed that appellate counsel was ineffective for not raising a claim as to the State's discovery violation. Trial counsel and appellate attorney both testified at the evidentiary hearing; Johnson did not. Trial counsel said his actions were based on trial strategy. Appellate counsel testified that she made a mistake. The circuit court denied the motion. Johnson appeals.

**AFFIRMED.**

**Division One holds:** The motion court did not err in finding that trial counsel was not ineffective, because the trial transcript and evidentiary hearing record both show that counsel's failure to object to the evidence of the violently themed books and his decision to question Johnson about it, as well as his agreement to submit the videotapes and transcripts of Harper's police statements, all were based on sound trial strategy. Even if counsel's actions were deficient, Johnson fails to show prejudice.

The motion court did not err in finding that appellate counsel was not ineffective in failing to raise a claim as to the State's discovery violation, because neither Johnson nor counsel testified at the evidentiary hearing as to how the non-disclosed testimony frustrated the defense strategy or would have affected it had counsel received proper notice. It is not clear, on this record, that reversal would have been reasonably probable (had the issue been raised on appeal) or that the discovery violation created fundamental unfairness.

**Per Curiam**

December 7, 2010

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